

## It ain't necessarily so: a legal realist perspective on the law of agency work

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**It ain't necessarily so:  
A Legal Realist perspective on the law of agency work**

**Abstract**

Discussion and analysis of British employment and labour law is often characterised by a curious dissonance. The overarching narrative mandates that labour law is a countervailing force to counteract the inequality of bargaining power, embedded with values and assumptions concerning the nature of employment relations and regarding the role of labour law within these relations. And yet, labour law jurisprudence tends to treat with respect, seeks to decipher, abstract statutory concepts and tests derived from judicial pronouncements as if they were, indeed, a 'brooding omnipresence in the sky'.

This paper seeks to bridge that gap, by offering a legal realist account of the legal doctrine that governs the employment of agency workers, focusing on the 'necessity' and 'sham' tests. In doing so, it assesses the legitimacy of importing legal tests from one (commercial) context to another (employment) context; questions the courts' protestations that their use is mandated by precedent; and outlines the real implications on the status and rights of agency workers in Britain.

**Keywords:** labour law, agency workers, sham, necessity, legal realism.

## Introduction

Open-ended concepts are sometimes used in law as helpful guidelines in resolving legal problems, but they may also lead to troublesome consequences in real, social and economic, life. The use of two concepts - sham and necessity - in the context of agency work, serves as a case in point. This paper employs insights and tools from Legal Realism to question the courts' methodology and conclusions, and to offer alternatives.

Agency work holds a significant place in British labour market and in British labour law jurisprudence.<sup>1</sup> In 2017, the Taylor Review estimated that the number of agency workers in the UK is between 800,000 and 1.2 million,<sup>2</sup> a figure that, even at the bottom end, represents an increase of 30 per cent in five years.<sup>3</sup> Other estimates suggest (based on a different methodology) that this watermark – of over a million agency workers – has been surpassed over a decade ago.<sup>4</sup> A Resolution Foundation Report found that whilst the stereotype is that agency work is short and temporary, the number of permanent agency staff is 'startling'. At times, years have passed, agencies were replaced, while the worker held her position and responsibilities throughout.

The motivation for employing workers through agencies is clear: the use of personnel who are normally not unionised and do not have job security offers an employer a good degree of flexibility to suit production and service needs; for some, savings on employment costs are an important concern.<sup>5</sup> To these, one may add that a political ideology that favours privatisation has led to regulatory requirements in the public sector that have mandated, over the past three decades, outsourcing of public services. We return to this aspect below.

Looking abroad, workers employed by agencies approached the courts in many jurisdictions with a legal challenge: to ascertain whether the triangular relationship is 'authentic' or 'fictitious'. In the former case, the worker will be deemed employed by the

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<sup>1</sup> P. Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 *OJLS* 869, 880.

<sup>2</sup> M. Taylor, *Good Work: The Taylor Review of Modern Employment Practices* (London: Department for Business, Energy and Industrial Strategy, 2017) 24.

<sup>3</sup> L. Judge, *Secret Agents: Agency Work in the New World of Work* (London: Resolution Foundation, 2016) 17.

<sup>4</sup> E. McGaughey, 'Should Agency Workers be Treated Differently?' (LSE Working Papers 07/2010) 2.

<sup>5</sup> S. McKay, 'Employer Motivations for Using Agency Labour: Hard Work, Hidden Lives: The Full Report of the TUC Commission on Vulnerable Employment' (2008) *Industrial Law Journal* 296, 297.

agency.<sup>6</sup> In the latter case, the court will unveil the ‘implied contract’ that the worker had with the end-user. In contrast, agency workers in Britain have a more formidable challenge, since they are routinely denied employment status, and consequently – denied statutory labour rights, with courts regularly asserting that the individuals involved are not employed by the agency *nor* by the end-user.<sup>7</sup>

While the plight of agency workers has been subject to a wide range of criticisms, from courts through academia to media coverage, this paper sheds light on the mechanisms that have created a legal route to a dire result. In particular, it shows that the courts have developed two doctrines that have often proven almost insurmountable (the exceptions are few and far between) to the claims of agency workers. These are the test of necessity, and the sham doctrine. Questioning the applicability and legitimacy of these doctrines through the deployment of the legal realist paradigm, this paper seeks to ‘demystify’<sup>8</sup> them and argues that, notwithstanding their protestations to the contrary, tribunals and courts had, and have, different options at their disposal, and their decision to deny agency workers employment status and rights is a controversial policy decision, rather than a necessary legal one.

The legal predicament of agency workers in general, and the contribution of courts in their development of the two doctrines of sham and necessity, has been addressed by a number of labour law scholars over the past decade. Section 1 will thus offer a brief overview of the controversial construction of the courts, which will be contended in the subsequent analysis. Section 2 applies legal realist insights to this subject matter whilst, first, challenging the descriptive portrayal of the two doctrines (2A) and, then, by addressing the problematic

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<sup>6</sup> G. Davidov ‘Joint Employer Status in Triangular Employment Relations’ (2004) 42 *British Journal of Industrial Relations* 727.

<sup>7</sup> H. Collins ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *OJLS* 353; ACL Davies, *EU Labour Law* (Cheltenham: Elgar, 2012) 195; J. Prassl, *The Concept of the Employer* (Oxford: OUP, 2016) 87-90, 171; L. Barmes ‘Learning from Case Law Accounts of Marginalized Working’ in J. Fudge, S. McCrystal, K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford: Hart, 2012) 303, 308; E. McGaughey, ‘Social Rights and the Function of Employing Entities’ (2017) 37 *OJLS* 482, 487; J. Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in M. Freedland et al (eds) *The Contract of Employment* 321, 335 (Oxford: OUP 2016).

<sup>8</sup> M. Fischl ‘Teaching Law as a Vocation: Local 1330, Promissory Estoppel, and the Critical Tradition in Labour Scholarship’ (2017) 33 *International Journal of Comparative Labor Law and Industrial Relations* 145, 147.

implications of the courts' approach (2B – Prescription) even beyond its effect on employment status and employment rights.

### **A. Two elusive and distracting concepts: Sham and necessity in employment relationships**

One premise of this paper is that, notwithstanding its analytical and objective pretences, the law routinely relies on concepts and doctrines that are, in Felix Cohen's memorable phrasing, 'not defined either in terms of empirical fact or in terms of ethics but ... are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy'.<sup>9</sup> Moreover, Cohen continues, legal reasoning based on those foundations is 'transcendental nonsense', since it is 'necessarily circular, since these terms are themselves creations of law'.<sup>10</sup>

This paper focuses on the employment of two such concepts - sham and necessity - in the context of agency work. Both find their genesis in the commercial, rather than the employment, context. Whilst serving different objectives, the two concepts are closely related, acting to regulate tripartite relationships. A contract may be implied between the end-user and the worker where the contractual arrangements are a sham or when it is 'necessary' to do so. Each of the two concepts rests on a different end of the analysis. 'Sham' is designed to lift the veil over what were, *ex ante*, 'agency arrangements which were never intended to reflect reality, but rather to obfuscate the true nature of the relationship'<sup>11</sup>; whereas the necessity test asks whether the relationship developed in such a manner that it is suitable, *ex post*, to imply an agreement between the end-user and the worker. Both concepts are familiar, and have been discussed quite extensively in labour law literature over the past decade, so a brief overview would suffice.

#### *1. Necessity*

The test of necessity was introduced to address the fact that, in a tripartite relationship, while the end-user acts as the individual's employer in daily affairs, there is no explicit contract

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<sup>9</sup> F. Cohen, 'Transcendental Nonsense and the Functional Approach' (1944) 35 *Columbia Law Review* 809, 820.

<sup>10</sup> *ibid.*

<sup>11</sup> *James v London Borough of Greenwich* [2008] EWCA Civ 35 [37]; *National Grid Electricity Transmission Plc v Wood* [2007] EAT UKEAT/0432/07 [38].

between the two. Instead, the two contracts that exist are those between the worker and the agency (which exerts little to no control over the worker, thus leaving ‘little room’ to find a contract of employment<sup>12</sup>) and between the agency and the end-user (for the terms according to which workers will be supplied).

The contract between the agency and the worker routinely falters due to lack of control, and because of the inability to find mutuality of obligations,<sup>13</sup> as it is often clear that the agency does not take upon itself to offer work on a regular basis.<sup>14</sup> Insofar as the relationship between the end-user and the worker is concerned, the question is: can such a contract be *implied*? Curiously, it was only in 2004, after more than two decades of intense contracting out, that *Dacas*<sup>15</sup> became the first occasion for the Court of Appeal (CoA) to confront ‘head on’ this question.<sup>16</sup> Denying the claimant, Munby J reasoned that the ‘differential distribution’ of the employer between the agency and the end-user ‘has hitherto been relied on by the industry as necessarily producing the happy outcome — happy, that is, both for the agency and the end-user, though not, of course, for the worker — that the worker has no contract of service either with the agency or with the end-user’.<sup>17</sup>

The court then asked whether, and if so – when, one should *imply* a contract with the end-user. Relying on the commercial case of *The Aramis*,<sup>18</sup> the court found that, where a contract does not exist, it may be implied only when it is *necessary* to do so. And, in a series of cases,

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<sup>12</sup> *Bunce v Postworth* [2005] EWCA Civ 490 [29].

<sup>13</sup> The latter is viewed by some to be the ‘key test’ – McGaughey, n 4 above, 16; M. Wynn and Patricia Leighton, ‘Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract’ (2009) 72 *MLR* 91; also *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217.

<sup>14</sup> *Montgomery v Johnson Underwood* [2001] IRLR 269, 275. The use of the mutuality of obligations test to deny employment status is not, of course, without its critics. See, eg, M. Freedland, *The Personal Employment Contract* (Oxford: OUP 2003) 98-105; A.C.L. Davies, ‘The Contract for Intermittent Employment’ (2007) 36 *Industrial Law Journal* 102; E. Albin and J. Prassl ‘Fragmenting work, fragmented regulation: The contract of employment as a driver of social exclusion’ in *The Contract of Employment*, n 7 above, at 209, 219-222. But cf Elias n 1 at 881.

<sup>15</sup> *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217.

<sup>16</sup> As noted in *James v Greenwich Council* [2008] EWCA Civ 35 [47]. Earlier decisions of the EAT did discuss the possibility, however briefly. See eg *Johnson Underwood v Montgomery* [2001] EWCA Civ 318.

<sup>17</sup> *Dacas* n 15 above at [83]. See similarly the minority opinion in *Johnson Underwood* n 16 above at [50]: ‘the existence of mutuality has to be considered in the context that the issue whether Mrs Montgomery was an employee is to be linked to the particular job of work in respect of which payment was being made’ (emphasis in original)

<sup>18</sup> [1989] 1 Lloyd’s Rep 213.

culminating in *James v Greenwich Council*,<sup>19</sup> the courts clarified that this test is applicable not only in the commercial, but also in the employment, context.

The facts pertaining to the necessity doctrine in *James* are instructive, and worth mentioning. Ms James provided support for unaccompanied under-18 asylum seekers on behalf of Greenwich council, through the Greenwich Social and Care Staff Agency. In doing so, however, the council continued to instruct her, set her work and working conditions, provide the materials and to organise the procedures. Ms James wore a council uniform, emblazoned with a council logo under her name. In 2004, she presented a claim for unfair dismissal. Accepting the EAT's analysis, the CoA agreed that, when inquiring whether to imply a contract where one does not exist, the court will ask 'whether it was necessary'<sup>20</sup> to do so, as *The Aramis* instructs. As the Court recognises that the decision whether to imply a contract is 'the real issue in the "agency worker" cases',<sup>21</sup> it is worth highlighting the precise content that the EAT breathed into the necessity test. Elias P explains that

where the obligations taken by the parties can be explained wholly by reference to the express contracts which make up the agency arrangement, then 'it is neither necessary nor appropriate to infer that there must be some other separate independent contractual obligation between the [worker] and the [end user]'.<sup>22</sup>

This reasoning was accepted by the CoA.<sup>23</sup> And so, the courts must inquire what the existing, relevant contracts dictate and to what extent they correspond with the reality of the situation. If there is no discrepancy, as in *James*, then a claim for a 'necessary', implied,

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<sup>19</sup> *James* n 16 above, following and elaborating on *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217. *Cable & Wireless Plc v Muscat* [2006] EWCA Civ 220.

<sup>20</sup> *James* n 16 above at [23].

<sup>21</sup> *James* n 16 above at [30].

<sup>22</sup> *James* n 16 above at [27], citing Munby J in *Dacas* n 11 above [35]; see also *James* [57]-[58] for an extended explanation of this position; and see a similar approach in *Stephenson v Delphi Diesel System Ltd* [2003] ICR 471. Also, in *Muschett v Her Majesty Prison Services* [2010] EWCA Civ 25 [18], stating that there is 'no need to consider whether to imply a contract of employment between [Mr Muschett and HMPS]' because the contractual terms in the case were clear and Mr Muschett worked in accordance with them; also Wynn and Leighton n 13 above at 315.

<sup>23</sup> *James* n 16 above at [42]: 'What Ms James did and what the council did were fully explained in this case by the express contracts into which she and the council had entered with the employment agency'.

contract will fail.<sup>24</sup> The mirror image of this picture can be found in two exceptional cases - *National Grid*<sup>25</sup> and *Harlow*.<sup>26</sup> In both cases, the contractual arrangements between the parties suggested a tripartite contract for services, while in reality the worker had a direct relationship with the client, who interviewed him, negotiated changes in pay, notice and holiday arrangements, and treated him ‘as though he were a wholly integrated member of staff’.<sup>27</sup> In such a situation, where the worker was integrated within the end-user’s enterprise *in a manner that was not consistent with the contracts*, the EAT found it *necessary* to imply a contract between the end-user and the worker. These cases suggested, for a short while, that the implication of a contract between the end-user and the worker could be quite commonplace.<sup>28</sup> However, subsequent cases ‘witnessed a dynamic of retrenchment on the part of the judiciary’.<sup>29</sup>

A notable shift in that direction, which arguably precludes optimism regarding the future implication of a contract of employment, is found in decisions delivered by the CoA in *Tilson*<sup>30</sup> and then in *Smith v Carillion*.<sup>31</sup> In these cases, the claimant’s argument to protection from unfair dismissal (*Tilson*); or for undertaking trade union activities, including health and safety duties in the construction industry (*Smith*),<sup>32</sup> was undermined by the fact that he was an agency worker. In many respects, the claimant’s situation in both cases was similar to those in *National Grid* and in *Harlow*: he was interviewed by the client; received safety instruction from the client; was provided with an office there; reported and was subject to discipline by the client’s managerial team; represented the client in meetings and signed documents on his behalf. However, these terms of engagement were not dictated by, or even supported by, the relevant contracts. And yet, the CoA found that ‘it is not unusual for an agency worker to be integrated into the business of the end user; and where the work is of a managerial nature, the worker will

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<sup>24</sup> *East Living v Sridhar* [2008]; F. Reynold, ‘The Status of Agency Workers: A Question of Legal Principle’ (2006) 35 *Industrial Law Journal* 320; E. Brown, ‘Protecting Agency Workers: Implied Contract or Legislation?’ (2008) 37 *Industrial Law Journal* 178.

<sup>25</sup> *National Grid* n 11 above at [40]; note that a similar dicta is found in *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98 [55], with no reference to a ‘necessity’ requirement.

<sup>26</sup> UKEAT 0144-07-2106 *Harlow District Council v O’Mahony & Anor* [2007].

<sup>27</sup> *National Grid* n 11 above at [40].

<sup>28</sup> M. Wynn, ‘End of the Line for Temps’ (2009) 158 *New Law Journal* 352.

<sup>29</sup> D. Cabrelli, *Employment Law in Context* (3<sup>rd</sup> ed, Oxford: OUP, 2018) 128.

<sup>30</sup> *Tilson v Alstom Transport* [2010] EWCA Civ 1308.

<sup>31</sup> *Smith v Carillion (JM) Ltd & Anor* [2015] EWCA Civ 209.

<sup>32</sup> Pursuant to the *Employment Rights Act* 1996, s 146.



have to fit into the management team'.<sup>33</sup> Should the *Smith* interpretation of the necessity test prevail,<sup>34</sup> it is difficult to see how a claim to imply a contract may succeed.

What we see here, in *Smith* and *Tilson*, is the court supplementing the necessity test, which it already acknowledged to be a 'difficult hurdle',<sup>35</sup> with yet another one. An indication of the supplementary legal principle to which the *Smith* court is referring may be found in its summary of the 'established' legal principles pertaining to agency work. There, hidden in the concise overview of the principles laid down, inter alia, in *James* and *Dacas*, Elias LJ includes an additional layer: after explaining that the necessity test may be met when the contractual arrangements do not reflect the true arrangements, he adds that 'it may also be simply because the relationship alters over time and can no longer be explained by the dual agency contracts alone'.<sup>36</sup> The court, it should be clear, made no effort to show how, in this particular case, the relationship had 'altered' over time, i.e. that it started out as a bona-fide agency relationship but transformed into something else. Quite the contrary, the overview of the facts in the case suggest that the relationship was consistent and stable from the start. Additionally, it is worth noting that whilst 'the mere passage of time' is repeatedly noted as insufficient to justify the implication of a contract on necessity grounds,<sup>37</sup> we find here that it may work to explain away the need to imply a contract where otherwise the necessity test *would have been* satisfied. In other words, the *criteria* for satisfying the necessity test *have changed*, to the detriment of workers. This is a crucial point, because a central argument for Legal Realism is that these concepts are more fluid and malleable than they are usually presented. As they are subject to incremental or significant interpretations and can absorb different content, these (interpretation and content) should arguably, insofar as possible, advance just social, economic and political aims, rather than distance the law from such aims.

## 2. *Sham*

As noted, like the necessity requirement, the 'sham doctrine' was first developed in a commercial context. In *Snook*,<sup>38</sup> Diplock LJ stated that, for the court to view a transaction as a sham, two conditions must apply. First, the appearance of the parties' legal rights and

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<sup>33</sup> *Smith* n 31 above at [35]; similarly *Tilson* n 30 above at [22].

<sup>34</sup> See recently *Heynike v 00222648 Ltd (formerly Birlec Ltd)* [2018] EWHC 303 (QB).

<sup>35</sup> *Smith* n 31 above at [28].

<sup>36</sup> *Smith* n 31 above at [21].

<sup>37</sup> *James* n 16 above at [31]; *Smith* n 31 above at [21].

<sup>38</sup> *Snook v London and West Riding Investment Ltd* [1967] 1 All ER 518.

obligations must be different from the actual rights and obligations. And, second, ‘all the parties thereto must have a *common intention* that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating’.<sup>39</sup> This construction governed the unfortunate path of sham interpretation in the British employment context. In several early, formative cases, *both sides* were content with the construction they had devised, which categorised the labourer as self-employed. It was a third party, namely – the British public, which was denied due taxes and national insurance contributions.<sup>40</sup> This social and economic context was a driving force when MacNeil J wrote: ‘The parties to a contract of employment cannot, by private arrangement, exclude from the arrangement public or community obligations’.<sup>41</sup>

On occasion, British courts were willing to expand the notion of sham beyond this narrow construction, and to embrace a broader notion of ‘contractual sham’. In such cases, the employer is seen to have adopted the relevant legal tests for employee status, as set by the courts, in a cynical way by inserting them verbatim into the contract so as to deprive employees of statutory rights.<sup>42</sup> For example, if the courts characterised employment as a personal relationship, the employer will simply insert a ‘substitution clause’ into the contract, formally empowering the worker to send a substitute to perform the work, even when it is clear to both parties that such a situation will never occur.<sup>43</sup> In response, courts, encouraged by legal scholars,<sup>44</sup> have become quite aware of the absolute ease of inserting ‘elaborate protestations’ to a contract to deny workers their rights, even ‘when examined, [they] bore no practical relation to the reality of the relationship’.<sup>45</sup> Thus, the CoA in *Szilagyi* noted that ‘To speak of terms “solemnly agreed in writing” is more redolent of commercial agreement reached between two parties of equal bargaining power than the kind of “take it or leave it” situation which can prevail in some agreements in the field of work’.

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<sup>39</sup> *ibid* 803 (emphasis added).

<sup>40</sup> See, e.g., *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 1 All E.R. 433; *Warner Holidays Ltd. v. Secretary of State for Social Services* [1983] ICR 440.

<sup>41</sup> *Warner* n 40 above at 454.

<sup>42</sup> Simon Deakin ‘The Changing Concept of the ‘Employer’ in Labour Law’ (2001) 30 *Industrial Law Journal* 72, 75; Elias n 1 above at 871, 884.

<sup>43</sup> A.C.L. Davies ‘Sensible Thinking About Sham Transactions’ (2009) 38 *Industrial Law Journal* 318, 323; cf *Express and Echo Publications v Tanton* [1999] ICR, CA.

<sup>44</sup> See e.g. B. Hepple, ‘Restructuring Employment Rights’ (1986) 15 *Industrial Law Journal* 69.

<sup>45</sup> Sedley LJ in *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 [41].

However, the dominance of the *Snook* doctrine has kept the ‘radical mainstream’<sup>46</sup> approach at bay for several decades insofar as a triangular employment relationship is concerned. As late as 2008, in *Kalwak*, the CoA echoed Diplock LJ’s approach and overturned Elias P’s ruling in the EAT, explaining that ‘a finding that the contract was in part a sham required a finding that *both* parties intended it to paint in that respect a false picture as to the true nature of their respective obligations’.<sup>47</sup> In a scorching critique of the decision, Lizzie Barmes notes that, to require collusion between an agency and agencies workers such as Ms Kalwak – a migrant from a poorer country who barely speaks English, with no access to legal advice – as a pre-condition, would essentially mean that ‘the law would never recognise that agreement in situations like the one before the court were a sham’.<sup>48</sup>

It was only in 2011 that the Supreme Court’s *Autoclenz*<sup>49</sup> decision expanded the concept of sham in the employment context. There, the Court instructed tribunals to focus on the ‘reality of the situation’ and the ‘actual obligations of the parties’, as derived from their true expectations and conduct, and to assess whether those differ from the contractual ‘protestations’. The instruction would thus be that ‘when employers draft contracts that do not represent the real nature of the relationship, courts must ignore such sham appearances and ask whether the characteristics that justify protection appear in the real life arrangements’.<sup>50</sup>

The focus of this approach, we find, is on the discrepancy between the contractual arrangement and the true employment relationship. While clearly expanding the *Snook* definition of sham beyond its original breadth, it is worth noting its limits in the present context. First, whilst the background facts in *Autoclenz* include an intermediary party, the SC ignored that aspect completely, and treated it as a standard, bilateral employment relationship. This is probably the case because the claimants’ argument focused on the existence of a contract between the worker and the agency, whereas the contentious aspect in many agency work cases concerns the ability to imply a contract between the worker and end user. Indeed, a few years later, Elias LJ’s premise seemed to be that *Autoclenz* required no ‘departure from established

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<sup>46</sup> A. Bogg ‘Sham Self-Employment in the Court of Appeal’ (2010) 126 *Law Quarterly Review* 166, 171.

<sup>47</sup> *Consistent Group v Kalwak* [2008] IRLR 505 [28].

<sup>48</sup> Barmes n 7 above at 319-320.

<sup>49</sup> *Autoclenz Limited v Belcher* [2011] UKSC 41.

<sup>50</sup> G. Davidov ‘Re-Matching Labour Laws with their Purpose’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011) 179.

jurisprudence regarding agency workers'.<sup>51</sup> Second, and more substantively, even the broader, *Autoclenz* rationale is not very remote from the content already given to the concept of sham in the agency context. This is because, as noted in the discussion concerning the necessity test - the courts assessed precisely this matter, to wit: *whether the relevant contracts reflect reality*. As Patrick Elias recently noted: '*Autoclenz* allows a court to deal with the cases where the agreement is a sham, but *the problems arise when it genuinely reflects the way in which the contract is performed*'.<sup>52</sup>

Moreover, as we see below, *Autoclenz* does not alter the premise that the employer's *intentions*, which led it to construct a roundabout structure to employ an individual, are immaterial, even if, for example, they 'adopt arrangements whose sole or principal purpose is to avoid the application of protective legislation'.<sup>53</sup>

## **B. What's wrong with this Picture? Wrong in its description, wrong in its prescription**

### *1. Description*

#### *i. Doctrinal Indeterminacy*

One of the fundamental insights of Legal Realism is that of *doctrinal indeterminacy*, the idea that the 'there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose'.<sup>54</sup> Moreover, it is '[b]y falsely presenting (often intuitive) value judgments made by judges as inevitable entailments of predetermined rules and concepts, [that] formalism obscures these choices'.<sup>55</sup>

In the present case, we may ask: were the courts forced to rely on the existing doctrines for, respectively, positing necessity as a precondition for the implication of a contract and setting a high bar for the assertion of a contract as a sham? In the present case, we need not look far to show why such an argument cannot hold. In the very context of the interpretation of the sham doctrine, the Supreme Court, first in *Gisda*<sup>56</sup> and then more explicitly in

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<sup>51</sup> *Smith* n 31 above at [30].

<sup>52</sup> Elias n 1 above at 884 (emphasis added).

<sup>53</sup> S. Deakin 'The Changing Concept of the 'Employer' in Labour Law' (2001) 30 *Industrial Law Journal* 72.

<sup>54</sup> Llewellyn n 81 above at 1241; F. Schauer, 'Legal Realism Untamed' (2013) 91 *Texas Law Review* 749, 752; H. Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (Oxford: OUP, 2013) 18-24.

<sup>55</sup> Dagan n 54 above at 22; F. Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 511.

<sup>56</sup> *Gisda Cyf v Barratt* [2010] UKSC 41 [37], [39]

*Autoclenz*,<sup>57</sup> offered a contextual approach where bilateral (as opposed to trilateral, including agency) employment relationships are concerned. Taking into account the different bargaining position of parties to an employment relationship, the Supreme Court unanimously accepted a ‘critical difference’<sup>58</sup> between commercial contracts and personal employment contracts. Instead, it endorsed the advice of the Court of Appeal in *Autoclenz*, namely: that ‘in this area of the law... a court or tribunal ... have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be *realistic and worldly wise* when it does so’.<sup>59</sup>

We find here an interesting lesson to be learned here regarding the formalist account of the venerable power of *stare decisis*. The 40 year old importation of the *Snook* interpretation of the sham doctrine to employment law is suddenly a thing of the past. How could that be the case? For Legal Realists, there is little here about which to be surprised, as courts rarely engage in an ‘impartial application of determinate existing rules’. Instead, they explain, ‘doctrine *qua* doctrine is radically indeterminate’<sup>60</sup> in at least two senses.

First, where the law is not settled, the tribunal or court has considerable discretion, because of the multiplicity of sources that are available. Mark Freedland, whose work would not necessarily align with Legal Realism wholesale, recently wrote that the ‘conspicuously wide range of norms’ which serve as sources for the structural principles governing the contract of employment ‘confer[] upon the judges ... an extensive latitude of choice as to the sources upon which they may draw’.<sup>61</sup> The decision to view a legal precedent as applicable (or not) is not an exercise in logic, but rather a political one, in the broad sense of the term. Since legal norms are ‘in the habit of hunting in pairs’,<sup>62</sup> and since ‘for every legal principle there exist[s] a potential counter-principle’,<sup>63</sup> a court may prefer a statute to a case that is putatively ‘on point’;

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<sup>57</sup> *Autoclenz* n 49 above.

<sup>58</sup> *ibid* [34]-[35]; and again in *Braganza v BP Shipping* [2015] UKSC 17 (Lady Hale, noting that the employment contract ‘is of a different character from an ordinary commercial contract’).

<sup>59</sup> Aikens LJ in *Autoclenz* CA n 45 above. The notion was re-emphasised by the Court of Appeal in *Uber v Aslam* [2018] EWCA Civ 2748 [49].

<sup>60</sup> H. Dagan, ‘Doctrinal Categories, Legal Realism and the Rule of Law’ (2015) 163 *University of Pennsylvania Law Review* 1889, 1891.

<sup>61</sup> M. Freedland ‘The Legal Structure of the Contract of Employment’ in *The Contract of Employment* n 6 above at 28, 35.

<sup>62</sup> W.W. Cook, Book Review, (1929) 38 *Yale Law Journal* 405, 406 (reviewing B. Cardozo, *The Paradoxes of Legal Science* (1928)).

<sup>63</sup> G.E. White ‘The Inevitability of Critical Legal Studies’ (1984) 36 *Stanford Law Review* 649, 651.

may view two previous cases as inherently conflicting (thus giving significant leeway to choose) or as reconcilable;<sup>64</sup> may take inspiration from other jurisdictions or view them as irrelevant, and so on examples abound. Moreover, the court may be influenced by ‘nonlegal’ (in the traditional sense) material, ‘whose existence and application are variable and manipulable’.<sup>65</sup> This does not mean that the ‘idiosyncratic’ version of Legal Realism – which would suggest that law is nothing but ‘a product of judicial bellyaches’<sup>66</sup> – should prevail. Indeed, we would not be able to discuss coherently the doctrine relating to agency work if the concept of legal doctrine were meaningless. Instead, Realists recognise the ‘interpretative leeway’<sup>67</sup> and discretion that judges have when required to deal with a new challenge. Frederick Schauer convincingly argues that this understanding of ‘indeterminacy’ should actually receive a different title, such as ‘dislocated determinacy’,<sup>68</sup> thus reflecting the true breadth of power at the hands of judges, and the limited authority of paper rules in certain situations.

Closely related to our field of enquiry, we note that *The Aramis* and *Snook* doctrines are not as stable and consistent, even within the commercial context, as the courts portrayed them to be. Thus, with regards to necessity, Brodie has observed that the *Aramis* itself was ‘a departure from orthodoxy’ as it is ‘inconsistent with a well-established body of case law which recognizes performance as a conventional mode of acceptance’.<sup>69</sup> As he (and others<sup>70</sup>) have explained, the implication of a term and, arguably, of a contract, could be decided on a less stringent test than that of ‘necessity’.<sup>71</sup>

And as for sham, we need only refer to Lord Clarke’s speech in *Autoclenz*, in which he notes that in the context of landlord and tenant, and housing in general, the courts have

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<sup>64</sup> For a closely related example see A. Bogg, ‘Sham Self Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328, 329 noting how the Court of Appeal in *Szilagyi* n 25 above ‘sought to downplay the differences between the EAT and Court of Appeal in *Kahwa* describing these as, in effect, differences of expression rather than differences of substance’.

<sup>65</sup> Schauer, n 54 above, 752.

<sup>66</sup> Cohen, n 9 above, 843.

<sup>67</sup> Dagan, n 60 above, 1903; K. Llewellyn, ‘The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method’ (1940) 49 *Yale Law Journal* 1355, 1385.

<sup>68</sup> Schauer, n 65 above, 769, 776.

<sup>69</sup> Douglas Brodie, ‘The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract’ in *The Contract of Employment*, n 6 above, 124, 132-133.

<sup>70</sup> McGaughey, n 4 above, 29.

<sup>71</sup> *Baird Textile Holdings v Marks and Spencer plc* [2001] EWCA Civ 274; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408; also *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [23] and *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [23].

repeatedly disregarded false arrangements even beyond the *Snook* scenario.<sup>72</sup> And, as mentioned earlier, the CoA in *Szilagyi*<sup>73</sup> and the EAT in *Kalwak*<sup>74</sup> sought to broaden the approach, prior to *Autoclenz*. On appeal, however, the CoA in *Kalwak* chose to reinstate the narrow, *Snook*, approach, noting that ‘to any lawyer the word “sham” in relation to a contractual document has the *Snook* meaning and the Chairman did not suggest he was using it in a different sense (*if there is one*)’.<sup>75</sup>

A Realist approach would be unambiguous on this matter: *clearly* there is a different sense of sham (as indeed the SC later decided in *Autoclenz*). The court’s effort to seemingly close down other interpretative avenues (‘if there is one’), was of the category lucidly criticised by Atleson: ‘the courts’ use of “of course” rationales tell us where the ghosts are buried ... the ghosts will be certain values and presumptions about the role of management and the place of employees deemed to be inherent in our industrial society’.<sup>76</sup> In doing so, formalism ‘bars the way to an open inquiry of the normative desirability of alternative judicial decisions, thus unduly essentializing contingent doctrinal choices’.<sup>77</sup>

A second sense of indeterminacy relates to the fact that courts may decide to move away from past precedents, even when the law *is* ‘settled’. Even the grandees of Legal Realism, such as Cohen and Llewellyn, agreed that, on many occasions, judges are influenced by, and apply, rules that they view as reasonable, relevant and efficient.<sup>78</sup> Indeed, some Realists argue that judges deviate from set rules only in moments of ‘paradigm shift’<sup>79</sup> which cannot be too frequent, else they risk endangering the sense of stability, and with it the sense of legitimacy, that (even) Realists acknowledge are important. The courts’ reasons for adhering to existing doctrine notwithstanding, they clearly have the power to deviate from it, when they choose to do so. Thus, one need not necessarily agree with Robinson’s quip that adherence to precedent is solely ‘a habit of mind in which a stupidity may be perpetuated on the grounds that it is well-

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<sup>72</sup> *Autoclenz* n 49 above at [23]

<sup>73</sup> *Szilagyi* n 25 above at [15]

<sup>74</sup> *Kalwak* n 47 above at [57].

<sup>75</sup> *Kalwak* n 47 above at [38] (emphasis added).

<sup>76</sup> J. Atleson, *Values and Assumptions in American Labor Law* (Amherst, Massachusetts: University of Massachusetts Press, 1983) 91; similarly Cohen, n 9 above, 810-812; Fischl, n 8 above, 155-156.

<sup>77</sup> Dagan, n 54 above, 23; Oliver Wendell Holmes, ‘Law in Science and Science in Law’ in Learned Hand (ed) *Collected Legal Papers* (New York: Harcourt, Brace and Company, 1921) 210, 230, 232, 238-239.

<sup>78</sup> Cohen, n 9 above, 840; K. Llewellyn, ‘A Realistic Jurisprudence - The Next Step’ (1930) 30 *Columbia Law Review* 431, 444.

<sup>79</sup> Dagan, n 60 above, 1905.

established’;<sup>80</sup> and still acknowledge that courts have significant discretion and capacity to develop the law.

The approach to precedent, then, is far more fluid than is often presented, and may be used as ‘a way of change as well as a way of refusing to change’ existing doctrine.<sup>81</sup> The judicial vision of the employment relationship, after all, has changed over time, at times because of a different ideological, or policy based, paradigm.<sup>82</sup> We find here, then, evidence to the fundamental insight of the Realist approach to judicial discretion: though not absolute (as the caricature of realism may suggest) it is far wider than what is suggested by the linguistic boundaries between the ‘core’ and ‘penumbra’ of a concept.<sup>83</sup>

## ii. *Realist Categories*

Beyond the general insight concerning judicial discretion and doctrinal indeterminacy, Legal Realists argue that the law should be context-sensitive. While this insight may seem innocuous (and perhaps obvious), it differs significantly from the formalist analysis. While taxonomy and classification are integral to legal formalism,<sup>84</sup> these usually refer to categories such as contract, tort, equity; or rights, rules, and remedies and so on.<sup>85</sup> In contrast, a transition of a doctrine from one century to another, or from one context to another, is not only legitimate, but serves to buttress the (formalist) myth of coherence and consistency.<sup>86</sup> Legal Realists recognise the importance of categories and classification, but have a very different approach to both. Realists recognise that thought cannot ‘go on without categories ... to classify is to disturb’.<sup>87</sup> But they assert that classifications are not part of an objective truth; rather, they are a social construct that should serve a purpose. Moreover, they argue, classifications should not be held as true simply because they solidified with time. Rather, they should be consistently

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<sup>80</sup> E. Robinson, ‘Law – an Unscientific Science’ (1934) 44 *Yale Law Journal* 235, 256.

<sup>81</sup> K. Llewellyn, ‘Some Realism About Realism: Responding to Dean Pound’ (1931) 44 *Harvard Law Review* 1222, 1253.

<sup>82</sup> Freedland, n 61 above, 35-36; Brodie, n 69 above, 130; and for an example concerning the development of assumptions concerning the expected length of a contract of employment (‘the annual hiring rule’) see N. Countouris, ‘The Contract of Employment as an Expression of Continuing Obligations’ in *The Contract of Employment*, n 6 above, 362, 365-369.

<sup>83</sup> Cf H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 607-608; and see the discussion in Schauer, n 54 above.

<sup>84</sup> P. Birks, *English Private Law* (Oxford: OUP, 2000).

<sup>85</sup> S. Smith, ‘Taking Law Seriously’ (2000) 50 *University of Toronto Law Journal* 241, 246.

<sup>86</sup> W. Twining, ‘Other People’s Power: The Bad Man and English Positivism, 1897-1997’ (1997) 63 *Brooklyn Law Review* 189, 198.

<sup>87</sup> Llewellyn, n 73 above.



challenged.<sup>88</sup> Legal categories should be based on values and social context, which would differentiate ‘consumer law’ from ‘labour law’, for example. They should be less concerned, in contrast, with doctrinal legal taxonomy, which may cut across these areas.<sup>89</sup> Doing so would tailor legal categories narrowly to achieve the ‘particularity and minuteness in the classification of human transactions for legal treatment’, remedying the ‘orgy of overgeneralisation’.<sup>90</sup> Dagan explains that ‘our lives are divided into economically and socially differentiated segments and each such “transaction of life” has some features that are of sufficient normative importance, which ... justif[y] a distinct legal treatment’.<sup>91</sup> Later, with Michael Heller, he argues for a taxonomy that includes ‘a wide spectrum of contract types, ranging all the way from purely instrumental deals with strangers ... to thick communitarian contract types’.<sup>92</sup>

In this case, the categories of the commercial contract should be understood to be significantly distinct from the employment contract. While the former often involves two professional, informed parties of similar expertise engaged in a one-off transaction, the latter often involves a party who is far less informed of the legal implication, who has no access to legal advice, and who enters a relationship that is set for years to come.<sup>93</sup> The argument would be, therefore, that the values underpinning the law itself (rather than an external critique regarding its political biases<sup>94</sup>) should reject the quick application of the commercial use of necessity and sham doctrines to the employment realm. Not only are the relationships exemplified in each realm of a different nature, but the values that the law seeks to advance in each are correspondingly distinct. Forcing a ‘unified’ approach to ‘contract’ in the abstract, without due regard to the critical differences in categories, risks undermining the unique and valuable social relationships in one (or more) of the relevant realms.

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<sup>88</sup> Id.

<sup>89</sup> G. Samuel, ‘English Private Law: Old and New Thinking in the Taxonomy Debate’ (2004) 24 *OJLS* 335, 341.

<sup>90</sup> H. Oliphant, ‘A Return to Stare Decisis’ (1928) 14 *American Bar Association Journal* 71, 73-74.

<sup>91</sup> Dagan, n 54 above, 57.

<sup>92</sup> Dagan and Heller, *The Choice Theory of Contracts* (Cambridge: CUP 2017) 72; S. Deakin and F. Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relations* (Kluwer 2000) 45. And see similarly H. Collins, *Regulating Contracts* (Oxford: OUP, 1999) 181.

<sup>93</sup> Prassl, n 7 above, 173; Prassl and Albin, ‘Employees, Employers and Beyond’ in *The Contract of Employment*, n 7 above, 341, 355-356.

<sup>94</sup> See M. Freedland ‘General Introduction—Aims, Rationale and Methodology’ in *The Contract of Employment*, n 7 above, 3, 23.

A side note may be of interest, at this stage. Notwithstanding the above, one should be wary of oversimplifying the breadth and implications of this insight. A troubling complexity is inherent in the approach that theory should follow categories because, at times, the theory is needed to determine which category should be applied. Such is the case, for example, when seeking to determine whether an individual is self-employed or a worker/employee. If she is self-employed, then a commercial approach to, say, the sham doctrine, would be perfectly legitimate. But if she is an employee, then we should prefer the broader, *Autoclenz* approach, which is more appropriate for the employment context. And yet, the very question that is laid before us is whether this is a commercial or an employment law context. In such cases, we have a Munchausen issue of the theory lifting itself by its own pigtail (and not, as is commonly perceived, by its bootstraps). This issue seems to have been noted, in passing, by Underhill LJ in *Uber* where, unlike the majority, he saw the respondent as entitled to rely on the commercial case of *Secret Hotels*<sup>95</sup> because the case may be ‘a consumer contract and not in the employment field at all’.<sup>95</sup> Happily for us, however, as there is no assertion that agency work scenarios do *not* belong within the employment sphere, this conundrum may be postponed for a later date.

### iii. *Law v Policy*

Famously, mainstream legal reasoning seeks to emulate the sciences in its logical and rational approach, deploying tools of classification, induction and deduction. We may have to credit William Blackstone or Edward Coke as two forebearers of this approach, but contemporary legal philosophers, such as Ronald Dworkin, who would reject the positivist mantle, assume a similar mindset, in this respect.<sup>96</sup> In particular, I refer to the delineation between law and policy. According to this formalist paradigm, law is effective in offering practical guidance *because* it ‘carries out its guidance function by limiting its domain of reasons’.<sup>97</sup>

This approach is highly apparent in the present context. Thus, reflecting on the effect that the decisions in *James* and *Cable and Wireless* had on legal certainty for the industry, Michael Wynn argues that it will now ‘be able to contract on firmer grounds of existing legal principle rather than the shifting sands of policy extension’.<sup>98</sup> Similarly, David Cabrelli suggests that by

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<sup>95</sup> *Uber* n 59 above at [153].

<sup>96</sup> R. Dworkin, *Law's Empire* (Oxford: Hart, 1986).

<sup>97</sup> L. Alexander and F. Schauer, ‘Is Policy Within Law's Limited Domain’ (2007) 26 *Queensland Law Journal* 221, 225.

<sup>98</sup> Wynn, n 28 above.

adopting the strict test for necessity, ‘the Court of Appeal acknowledged that orthodox legal doctrine such as contractual intention and freedom of contract ought to be afforded priority over policy considerations’. In contrast, he suggests, the *Dacas* decision was ‘clearly motivated by policy considerations ... at the expense of doctrinal coherence’ and that the response reflected uneasiness ‘about the sacrifice of legal principle at the altar of policy’.<sup>99</sup> Moreover, whilst recognising the predicament that the ‘legal principle’ posits for agency workers, Robert Davies reverts to the age old, positivist division of labour: legal principles are for the judiciary, whereas policy initiatives ‘are more appropriately to be a function of Parliament’.<sup>100</sup>

The judiciary has been happy to repeat this mantra. Thus, the Court in *James* sought to address the ‘unrealistic expectations’ that ‘some litigants and their advisers and representatives appear to have about what courts and tribunals can legitimately do to remedy their grievance’ in an extraordinary Postscript of the decision, part of which is worth reciting:

Through their decisions adjudicating on legal disputes courts and tribunals are builders in the law. They are not architects of economic and social policy... As they must operate within the legal architecture created by others, they cannot confer the right not to be unfairly dismissed on a worker who is without a contract of employment.<sup>101</sup>

More recently, in the gig economy case of *Uber*, Underhill LJ wrote, in his minority opinion, that ‘[p]rotecting against abuses of inequality of bargaining power is the role of legislation’, and not of the courts.<sup>102</sup> And Elias LJ, writing extra-judicially, recognises the serious problems relating to the status and rights of agency workers and workers on zero hours contracts, but asks ‘to what extent the problems are caused by the judiciary, and whether they could and should have developed the common law so as to frustrate these developments’.<sup>103</sup> He subsequently suggests that ‘Judges are applying contract law’, and it does not mean that ‘because there is a problem, the judges can fashion the solution’.<sup>104</sup>

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<sup>99</sup> Cabrelli, n 29 above, 128-129.

<sup>100</sup> R. Davies, ‘Contracting out and the Retention of the Employment Model in the NHS’ (2004) 33 *Industrial Law Journal* 95, 115; also Wynn, n 28 above.

<sup>101</sup> *James* n 16 above at [56]. A similar apologia was offered by the court in *Bunce* n 12 above at [32].

<sup>102</sup> *Uber* n 59 above at [147]

<sup>103</sup> Elias, n 1 above, 880.

<sup>104</sup> Elias, n 1 above, 885-886.

Such false modesty concerning the role of the judiciary is embedded in legal formalism,<sup>105</sup> and has a clear purpose. In embracing this approach, the courts shield themselves from ideological, political, social and economic criticism.<sup>106</sup> If courts simply implement decisions dictated by others, one cannot fault them for the *effects* of those decisions. Of course, Legal Realists reject this distinction between law and policy wholesale, and the division of labour between courts and legislatures that derives from it.<sup>107</sup> Llewellyn explains that the doctrinal indeterminacy, noted above, leaves judges with a choice between equally authoritative options, and that choice ‘*can be justified only as a question of policy*’.<sup>108</sup> And Schauer clarifies that a judge may depart from an immediately applicable ‘paper rule’ on the basis of her perception of ‘justice, policy or the equities of a particular controversy’.<sup>109</sup> Some have gone further, suggesting that, as the victims of the doctrine are often those who are less well-off, traditional legal discourse operates in a sinister way, as ‘economic prejudice masquerading in the cloak of legal logic ... to perpetuate class prejudices and uncritical assumptions which could not survive the sunlight of free ethical controversy’.<sup>110</sup>

It should be made clear that it is not only explicit, political, ‘progressive’ or ‘conservative’ policy that qualify within the Realist mindset. Rather, Legal Realists would claim that courts ‘do (legal) policy’ and thus – embrace values (and reject others) as a matter of course.<sup>111</sup> In the instant case, for example, Realists would thus suggest that courts do policy when they embrace ‘freedom of contract’ in a highly particularised and narrow manner whilst relying on ‘independence and formal equality [as] the only legitimate commitments of the law, *tout court*’.<sup>112</sup> One may continue to argue that other *legal* approaches are possible, and these may include the acknowledgment of inequality of bargaining power and the importance of securing substantive equality and/through workers’ rights. Both are respectable values, and the choice of one over the other is nothing other than a choice of legal policy. Indeed, the fashionable ‘purposive interpretation’ approach, which is having noticeable impact in labour law

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<sup>105</sup> Freedland, n 61 above, 36.

<sup>106</sup> Schauer, n 55 above, 510; Dagan, n 54 above, 16, 22, 33.

<sup>107</sup> J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: OUP, 1983) 227.

<sup>108</sup> Llewellyn, n 81 above, 1252.

<sup>109</sup> Schauer, n 54 above, 776 fn 113.

<sup>110</sup> Cohen, n 9 above, 817, 840.

<sup>111</sup> K. Klare ‘Horizons of Transformative Labour Law’ in J. Conaghan, M. Fischl, K. Klare *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford: OUP, 2002) 3.

<sup>112</sup> H. Dagan and A. Dorfman, ‘Just Relationships’ (2016) 116 *Columbia Law Review* 1395, 1413.

jurisprudence, incorporates policy making (who should benefit from the legislation? What are the consequences of competing interpretations? etc) into traditional judicial action.<sup>113</sup>

So how are we to decide between the *legal policies* present in the instant case? Arguably, recognising a contractual construction that deprives an employee of her status and hence – her access to statutory rights – is foreign to employment law (policy) as is a term that seeks to deny employment status simply through the incorporation of a term that states that ‘this is not an employment contract’.<sup>114</sup> The EAT in *Cave v Portsmouth* rightly noted what should be obvious, i.e. that ‘the perception of the parties could not be decisive of the issue whether a contract existed. Indeed, I doubt whether it has any relevance at all to the question whether it is necessary to imply a contract in order to explain the way in which the relationships operate in practice’.<sup>115</sup>

One may suggest, for example, a test for assessing whether a trilateral arrangement is perceived as ‘authentic’ or ‘fictitious’ (and, correspondingly, whether a contract should be implied) could be governed by the overriding principle – is it intended to circumvent collective agreements and thus undermine worker rights?<sup>116</sup> In contrast, British courts found that ‘it is important to bear in mind that *it is not against public policy* for a contractor to obtain services in this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed’.<sup>117</sup> One may wonder if a decision that a given act is ‘not against public policy’ is not a policy decision? And, more extensively, the court in *Tilson* noted that, according to prevalent judicial policy it is *not*

legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employees. In many cases that is undoubtedly the reason why employers enter into agency arrangements.<sup>118</sup>

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<sup>113</sup> *Autoclenz*, n 49 above; McGaughey, n 7 above, 495; Davidov, n 50 above; G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016)

<sup>114</sup> *Ferguson v Dawson Ltd* [1976] 1 WLR 1213, 1222; McGaughey, n 70 above.

<sup>115</sup> *Cave v Portsmouth* [2008] UKEAT/0608/07/ZT [23].

<sup>116</sup> As is the case in Israel: LA 52/142-3 *Albarniyat v Kfar Ruth* 535; LA 602/09 *The State of Israel – Ministry of Education v Aloni*; LA 6818-10-10 *The National Insurance Institute v Dayan* (unpublished).

<sup>117</sup> *Smith*, n 31 above at [22] (emphasis added). Also Elias, n 1 above, 885.

<sup>118</sup> *Tilson*, n 30 above at [11]

Similarly, setting the bar high to satisfy the ‘sham’ criterion led the British courts to find that

... there is nothing unlawful or wrongful in what Brooke Street as the employment agency and the council as the end user are evidently seeking to achieve for their own mutual advantage: that, if possible, Mrs Dacas works as a cleaner but not under a contract of service with either of them. They are entitled to arrange their affairs with that lawful aim in mind.<sup>119</sup>

The council and the agency’s ‘affairs’ and ‘mutual advantage’ were clearly at the expense of Mrs Dacas, and to her disadvantage. The court reached a conclusion that is nothing but ‘legal policy’, namely: that depriving a worker of statutory rights is a ‘lawful aim’. Courts in other jurisdictions found such an arrangement to be ‘fictitious’, because it did not serve ‘authentic’ business ends, thus falling beyond the pale of a (legitimate) legal aim; in contrast, British courts *chose* not only not to find them unlawful, but also not ‘wrongful’.

iv. *Interim Summary*

What, therefore, were the options open before a court presented with an agency arrangement, and confronted with the hurdles of sham and necessity? First, it was free to reject any recourse to the two concepts at all. Indeed, a comparative perspective suggests noted that the British reference to the two concepts is unique, and is not paralleled in other countries. A contract of employment can be assumed to exist, as is done in Australia and on the continent, between the agency and the worker.<sup>120</sup> Alternatively, the court could simply assert that an implied contract exists simply when it offers a better explanation of the reality, notwithstanding the existence of contracts that state otherwise.<sup>121</sup> This approach often seeks to distinguish ‘authentic’ from ‘fictitious’ contracts, with no regard to ‘necessity’ and ‘sham’ constraints.<sup>122</sup>

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<sup>119</sup> *Dacas* n 15 above at [51]

<sup>120</sup> M. Freedland, *The Personal Employment Contract* (OUP 2003) 55; Nicola Contouris *The Changing Law of the Employment Relationship* (Aldershot: Ashgate, 2007) 37; Guy Davidov ‘Joint Employer Status in Triangular Employment Relations’ (2004) 42 *British J of Ind Rel* 727; Judy Fudge, ‘The Contract of Employment and the Scope of Legal Regulation’ (2006) 44 *Osgoode Hall Law Journal* 609; McGaughey, n 7 above, 498; Riley, n 7 above, 334.

<sup>121</sup> G. Davidov, ‘Unbound: Some Comments on Israel’s Judicially-Developed Labor Law’ (2009) 30 *Comparative Labor Law and Policy Journal* 283.

<sup>122</sup> For a similar (and related) argument, suggesting that ‘mutuality of obligations is not a test for employment’, see E. McGaughey ‘Uber, the Taylor Review, Mutuality, and the Duty to Not Misrepresent Employment Status’ (2019) 48 *Industrial Law Journal* 180, 189.

Second, it could make use of the necessity and sham concepts, but offer a radically different interpretation – one that is sensitive to the implications. As Freedland and Kountouris note, there ‘seems to be little or no perception ... that the implication of a contract of employment might be judged to be ‘necessary’ in the very different sense that any other legal construction would deprive the worker of a legally protected status vis-à-vis the [hir]er’.<sup>123</sup> In particular, one could suggest that the *legal analysis* should not be dismissive of the fact that ‘[t]he conclusion of the Employment Tribunal that Mrs Dacas was employed by nobody is simply not credible. There has to be something wrong with it’ and that such a result ‘defies common sense’.<sup>124</sup> The path, after all, is already paved, and only needs following. We noted above that the court was satisfied, in a commercial context, with a test for implied terms that would ask what is ‘strictly necessary [...] to give effect to the reasonable expectations of the parties’.<sup>125</sup> One would assume that, in an employment context, those reasonable would include, *inter alia*, the expectation of an agency worker that she has not been thrust into a legal vacuum, with no employer and thus deprived of any employment rights.

As Lord Sumption observed, the impact of concepts such as rationality has spread beyond public law, and they now play ‘an increasingly significant role in the law relating to contractual discretions, where the law’s object is also to limit the decision-maker to some relevant contractual purpose’.<sup>126</sup> It is thus for the court to decide if safeguarding workers’ rights and redressing inequality of bargaining power is such a ‘relevant contractual purpose’.

With respect to sham, we saw that the Supreme Court in *Autoclenz* (and its precursors<sup>127</sup>) explained how and why this could be done. It would now only need to apply this approach to trilateral employment relations.<sup>128</sup> As for ‘necessity’, the court could imbue it with content that takes into account the implications of the commercial interpretation, which posits an insurmountable bar for the vast majority of workers. Such a prescription would sit well with Legal Realists, who ‘insist that legal reasoning .... should be oriented toward the human end served by law [and] should not blind itself to ... broader social ramifications’<sup>129</sup> and supports

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<sup>123</sup> M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP 2011) 166.

<sup>124</sup> *Dacas*, n 15 above at [71], [78].

<sup>125</sup> *Hyman*, n 71 above at 459; McGaughey, n 4 above, 30.

<sup>126</sup> *Hayes v Willoughby* [2013] UKSC 17.

<sup>127</sup> See also *Szilagyí*, n 25 above; Bogg, n 46 above.

<sup>128</sup> As unsuccessfully argued by the claimant in *Smith*, n 31 above at [30].

<sup>129</sup> Dagan, n 54 above, 37.

‘the adjustment of principles and doctrines to the human condition they are to govern rather than first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument’.<sup>130</sup> We turn to this perspective now.

## 2. *Prescription*

One of the less noted differences between formalist, legal positivism, on the one hand, and Legal Realism, on the other hand, relates to the ‘the factual matrix’<sup>131</sup> that needs to be taken into account when determining legal questions. In particular, students are taught, lawyers argue and judges routinely decide the law as they turn to past decisions – statutes passed by parliaments, regulations handed down by the administrative branch and, of course, precedents of relevance decided by courts in the past. Intriguingly, ‘mainstream’ labour law scholarship noted the shortcomings of this approach, suggesting that law has to consider ‘the social effect of the norm ... the way in which it appears in society and ... its social function’.<sup>132</sup>

And yet, tribunals and courts seemingly accord little to no weight to the expected *impact* of the decisions – how they will affect the parties involved, let alone – those beyond. Moreover, as observed in the discussion of the Postscript in *James*, it is almost a sense of professional integrity that *requires* the court to treat future effects of the decision with a degree of benign neglect. To an extent, there is some overlap between this matter and the distinction between law and policy. One may suggest, thus, that ‘law’ is backwards looking; whereas ‘policy’ is forward looking.

But if that is indeed the case, then the instant inquiry offers further impetus to the need to rethink this distinction. However, in contrast to the previous discussion, here the focus is somewhat different. Rather than suggesting whether courts should take into account certain principles that are often viewed as matters of ‘policy’, the emphasis here is that court decisions do not only resolve past disputes on the basis of norms promulgated in the past, but necessarily affect the behaviour of a wide range of actors in the future. This seems like a trivial insight and, indeed, one that is accepted by those far removed from the Legal Realist camp. Thus, Brian

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<sup>130</sup> R. Pound, ‘Mechanical Jurisprudence’ (1908) 8 *Columbia Law Review* 605, 610.

<sup>131</sup> *Frank v Renters Ltd* [2003] IRLR 423 [26]; Sedley LJ in *Autoclenz* CA, n 45 above at [103].

<sup>132</sup> O. Kahn-Freund ‘Postscript’ in R. Lewis and J. Clark *Labour Law and Politics in the Weimer Republic* (Oxford: OUP, 1981) 199.



Leiter speaks of law's central function to provide 'effective guidance',<sup>133</sup> building on the foundations laid by Joseph Raz<sup>134</sup> and HLA Hart.<sup>135</sup> Further, this thesis was developed by others, with particular emphasis on private law.<sup>136</sup>

In contrast, Legal Realists, always the sceptics, are those who question the effectiveness of the law. Here they share an interesting commonality with labour law scholarship over the past century.<sup>137</sup> Oliver Wendell Holmes famously posited that we should view the law from the point of view of 'our friend the bad man ... who cares only for the material consequences of his acts'.<sup>138</sup> This 'bad man' is a construct who, Twining explains, is 'amoral, rational and calculating'.<sup>139</sup> This seems only to clarify the obvious, to wit – that the law is not always effective, and does not always guide behaviour in the way that was intended. The 'bad man' will thus take a calculated risk and, for example, deny her employees minimum wage if the expectancy of a severe penalty is sufficiently low. But in viewing the law from this point of view Holmes offers a very different perspective than that espoused by HLA Hart, for example. Hart posits that legal norms provide standards for behaviour and conduct for the subjects, who obey not only due to fear of sanctions, but also because they embrace the 'internal point of view', and accept the normativity of the legal system.<sup>140</sup> Such an approach would seem foreign to Holmes's 'bad man'.

As crucial as this gap is in the diametrically different take on the psychological evaluation of the citizenry, it misses a fundamental grey area, which is critical for present purposes, and is also instructive more generally. For the Hart/Holmes disagreement concerns itself with the extreme case of an individual who considers *disobeying* the law.<sup>141</sup> While obviously an area of copious jurisprudential analysis,<sup>142</sup> arguably it is far more common, and intellectually

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<sup>133</sup> B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: OUP, 2007) 129.

<sup>134</sup> J. Raz, *The Authority of Law: Essays on Law and Morality* (2<sup>nd</sup> ed, Oxford: OUP, 2009) 213

<sup>135</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 82-88.

<sup>136</sup> S. Smith, 'The Normativity of Private Law' (2011) 31 OJLS 215, 223ff; Ernest Weinrib, 'Private Law and Public Right' (2011) 61 *University of Toronto Law Journal* 191, 201.

<sup>137</sup> R. Dukes, 'Critical Labour Law: Then and Now' in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham: Elgar, 2019).

<sup>138</sup> Holmes, n 77 above, 171.

<sup>139</sup> Twining, n 86 above, 209.

<sup>140</sup> Hart, n 135 above, 82-88.

<sup>141</sup> See Twining, n 86 above, 203.

<sup>142</sup> See, eg, J. Raz, *The Authority of Law: Essays on Law and Morality* (2<sup>nd</sup> ed, Oxford: OUP, 2009) 233-249; T. Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

challenging, to posit the case of an individual who seeks to circumvent the *spirit* of the law, whilst remaining true to its *letter*, a form of ‘creative compliance’.<sup>143</sup> In other words, an individual who does not fully embrace the internal point of view, but is not as cynical as the caricature of the ‘bad man’; rather, he views law as a force to be ‘avoided, evaded or perhaps used for his own purposes’.<sup>144</sup> This individual seeks not only to avoid sanctions, but also moral opprobrium, by maximising his advantage whilst staying within the law.

One need only to refer to the multitude of examples in the corporate realm, in spheres ranging from privacy to tax evasion, in which a common response to charges of dubious practices is that the company has ‘done nothing illegal’.<sup>145</sup> Leaving to one side the sad (and obviously misguided) conflation of legality and morality (and thus – the argument that if a practice is not illegal, it is necessarily not immoral<sup>146</sup>), the question is: should the courts take into account such consequences of their decisions and internalise them into their legal reasoning? To clarify, we are no longer concerned here with the narrow, immediate implication of the decision, e.g. to deny employment status, and therefore – employment rights, from marginalised workers. Rather, we focus on the broader way in which judicial decisions have a future impact. Law, after all, ‘affects people’s lives dramatically’<sup>147</sup> well beyond the courtroom. Rather than viewing the law as reflecting from the present to an occurrence in the past, and governing its consequences, it is recognised that ‘law does not simply reflect social context, but also shapes it’.<sup>148</sup> One may say that the court’s analysis has an ‘observer effect’ quality, in that the observation and analysis change the nature of the phenomenon being observed – accounting for ‘the actual social effects of legal institutions and legal doctrines’.<sup>149</sup>

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<sup>143</sup> Cf A. Pyman, ‘Creative Compliance in Labour Relations: “Turning the Law on its Head”’ in David Lewin, Bruce Kaufman (eds) *Advances in Industrial and Labor Relations* (vol 14, Emerald Publishing, 2005) 67.

<sup>144</sup> Twining, n 86 above, 210.

<sup>145</sup> See eg R. Dyson, ‘There’s nothing wrong with tax avoidance: we’re all forced to do it’ *The Telegraph* (18 April 2015). <https://www.telegraph.co.uk/finance/personalfinance/tax/11544284/Theres-nothing-wrong-with-tax-avoidance-were-all-forced-to-do-it.html>

<sup>146</sup> D. Nicolson, ‘Education, Education, Education – Legal, Moral and Clinical’ (2008) 42 *Law Teacher* 145, 153.

<sup>147</sup> H. Dagan, ‘The Real Legacy of American Legal Realism’ (2018) 38 *OJLS* 123, 142; Schauer, n 54 above, 779.

<sup>148</sup> C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 649.

<sup>149</sup> R. Pound, ‘The Scope and Purpose of Sociological Jurisprudence (Concluded)’ (1912) 25 *Harvard Law Review* 489, 512.

For Realists, the consequences of this insight are straightforward. The Realist conception of law ‘is both backward looking and forward looking, constantly challenging the desirability of existing doctrines’ normative underpinnings, [and] their responsiveness to the social context in which they are situated’.<sup>150</sup> In the current context, this ‘responsiveness to the social context’ is acutely necessary. This is because social-economic situations in general, and in the employment context in particular, are rarely constant. Rather, employers may, and indeed do, adapt or even manipulate their behaviour to satisfy the legal tests which courts set.<sup>151</sup>

In the case at hand, we find a common thread that carries throughout the jurisprudence of employment relationship: the focus on the employer’s control over the worker’s activity, or even more broadly, her integration into the workplace: ‘the daily contact ... the nature and the extent of the dealings between them’.<sup>152</sup> Jeremias Prassl suggests that ‘the objective fact and degree of control was suggested to be the crucial element in finding an implied contract of employment’.<sup>153</sup> Even critics of the courts’ more progressive approach agree that ‘Questions of mutuality and control intertwine in many of the cases concerning multilateral relationships’.<sup>154</sup> Indeed, the EAT in *Motorola v. Davidson*<sup>155</sup> concluded that the worker, though contractually an employee of a third party, should be viewed as an employee of Motorola, relying *solely* on the latter’s control over the individual. Similarly, the CoA in *Dacas* stressed the presence of day to day control as a central and necessary condition to establish a contract between the end user (or agency) and the worker.<sup>156</sup>

Against this background, we can now point to a guiding rationale that underlies the tests for the sham doctrine and the necessity requirement, which is thus crucial to the success of claim for employment status in the context of a trilateral relationship:

*The stronger the association of the employee to the end-user, beyond the realms of the contractual engagement, the stronger the tendency to treat the distancing contract as a sham or, alternatively, to imply a contract between the end-user and the worker. In contrast, the*

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<sup>150</sup> Dagan, n 54 above, 65.

<sup>151</sup> See, in a slightly different context (manipulation of the tests for the establishment of the contract of employment) Riley, n 7 above, 331-332.

<sup>152</sup> *Dacas* [61], Mummery, J.

<sup>153</sup> J. Prassl, *The Concept of the Employer* (Oxford: OUP, 2016) 170.

<sup>154</sup> Wynn & Leighton, n 13 above at 313-314.

<sup>155</sup> *Motorola Ltd v Davidson* [2001] IRLR 4.

<sup>156</sup> *Dacas* n 15 above at [61].

*greater the distance between the employee and the daily routine of the workplace, the more the court will be inclined to reject the claim for an implied contract.*

Taking a broader view, one may argue that if long term contractual relations ‘should aim at developing governance structures that sustain interdependence and are conducive to long-term trust and solidarity’,<sup>157</sup> then this jurisprudence induces precisely *the opposite effect*, by encouraging practices that exacerbate the distancing amongst workers and between employers and workers. For if a given end-user seeks to avoid the obligations associated with his responsibilities as employer, and becomes aware that courts will be assessing if an individual is treated ‘as though he were a wholly integrated member of staff’,<sup>158</sup> one may assume that it will adapt accordingly by reducing the integration between itself and the workers. As we already witness, employers insist, for example, that the provider will operate from her own facility (perhaps even in another country), and that workers will refrain from wearing the company’s uniform so as to reduce the risk of reclassification.<sup>159</sup> The practice of increased ‘distancing’ - ‘the displacement of employment contracts by commercial contracts’<sup>160</sup> – serves as a means to that end.

Indeed, an exceptional indication of this mindset is evident in the Guidance given from the office of the Deputy Prime Minister, quoted in *Woodhouse*:<sup>161</sup>

30.1 Neither Leeds North West Homes nor its personnel shall in any circumstances hold itself or themselves out as being the servant or agent of the Council otherwise than in circumstances expressly permitted by the agreement.

This is a good place to note a crucial point, which unfortunately veers beyond the remit of this piece and thus cannot be fully explored here – that which concerns the identity of the end-user. It is not coincidental that quite a few of the agency work cases discussed here – including

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<sup>157</sup> Dagan and Heller, n 92 above, 104.

<sup>158</sup> *Kahwak*, n 47 above, 40.

<sup>159</sup> G. Bensinger, ‘Startups Scramble to Define “Employee”’, *Wall St. J.* (July 30, 2015) <https://www.wsj.com/articles/startups-scramble-to-define-employee-1438228860> ; Dagan and Heller, n 92 above, 70.

<sup>160</sup> A. Atkinson, ‘Flexibility or Fragmentation? The UK Labour Market in the Eighties’ (1987) *Labour and Society* 87; also S. Fredman ‘Labour Law in Flux: The Changing Composition of the Workforce’ (1997) 26 *Industrial Law Journal* 337, 338.

<sup>161</sup> Section 6.5 of the ET’s judgment, cited in the *Leeds Council v Woodhouse* [2010] EWCA Civ 410 [7] (emphasis added).

*Dacas, James, Woodhouse, Pegg, and Cave* – involve local authorities. While, in the past, those employed in a wide range of public services were generally employed directly by the (national or local) government, the Conservative government implemented the Compulsory Competitive Tendering programme in the 1980s, which changed the default position by *requiring* local authorities and other public bodies (with the NHS a prominent example<sup>162</sup>) to move from in-house employment to contracting out.<sup>163</sup> Part 2 of the Deregulation and Contracting Out Act 1994 further facilitated contracting out by empowering ministers to transfer public functions to the private sector without the need for specific legislation. This ‘qualitative change’ has led scholars like Mark Freedland to express concern that, under the guise of a ‘little and mechanical’ reform, the British government managed to change central features of constitutional law through the seemingly innocuous policy of contracting out.<sup>164</sup>

The consequences have become clear: some authorities source over 10 per cent, and up to 20 per cent, of their staff from agencies.<sup>165</sup> Returning to the Deputy Prime Minister’s Guidance quoted above, we find that the relevant ministry, or local authority, may extend the ‘arm’s length’, reduce control, minimise supervision, curtail government training and moderate daily contact with the workers providing public services, reacting to the looming threat of a judicial decision that will ascribe employer responsibility to the government authority.<sup>166</sup>

One example for such a state of affairs became evident during a litigation in Israel brought by several secretaries who were employed, through a service provider, by the Revenue Service.<sup>167</sup> Justice Rosenfeld described how, ‘prior to the claim brought by the plaintiffs, some of the secretaries who are plaintiffs in this case, sat in the same room as secretaries who are government employees. Immediately following the submission of the motion to the court, ... six secretaries who are government employees were placed in the ‘small room’, while the

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<sup>162</sup> P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford: OUP, 2007) 98-104.

<sup>163</sup> S. Fredman, ‘Women at Work: The Broken Promise of Flexicurity’ (2004) 33 *Industrial Law Journal* 299, 308; P. Davies and M. Freedland, *Labour Legislation and Public Policy: A Comparative History* (Oxford: OUP, 1993) 37-38; S. Fredman and G. Morris, *The State as Employer* (Oxford: OUP, 1989) 435.

<sup>164</sup> M. Freedland, ‘Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994’, *Public Law* (1995) 21, 23.

<sup>165</sup> McGaughey, n 70 above; Euginia Markova and Sonia McKay, ‘Understanding the Operation and Management of Employment Agencies in the UK Labour Market’ (TUC Commission on Vulnerable Employment, London 2008) 18.

<sup>166</sup> D. Weil, *The fissured workplace: Why work became so bad for so many and what can be done to improve it* (Cambridge, Mass.: Harvard University Press 2013) 188, 196.

<sup>167</sup> Labour (Jerusalem) 2513/00 *Zerifa v the State of Israel – Ministry of Finance* (unpublished).

plaintiffs were moved to the ‘big room’”.<sup>168</sup> Ten years later, the present author was approached by workers employed, through an agency, by the Department of Social Services in a major municipality. Upon hearing of the approach, the municipality’s legal counsel instructed the department not to allow agency workers to enter the department building, to use department computers or to participate in staff meetings. The municipality was clear as to the aim of this instruction: workers cannot be perceived as having obtained the relevant ties to support the claim that they are employed directly by the municipality.

From the worker’s perspective, the fear that an employment contract would be implied, or that the existing contracts would be declared ‘sham’ (as they do not reflect the reality of the relationship) has led the employer to limit the worker’s integration, responsibilities and inclusion in the work environment. Familiar examples include denying agency workers access to facilities enjoyed by regular staff members, such as eating in the canteen, transportation to and from the workplace, use of staff showers, and so forth.<sup>169</sup>

The implications on private and public services, and not only on workers’ rights, are thus far reaching. Legal Realists would suggest that courts should not ignore these implications, or the common sense trajectory that lead from their own decisions.

### **Conclusion**

The jurisprudence concerning agency work offers fertile ground for Legal Realism: judges reaching significantly different conclusions whilst seeking to cover them with a veil of doctrine in a manner that would enrage the likes of Felix Cohen and Karl Llewellyn. But it is not only an academic exercise that concerns us here. Agency work, outsourcing, and sub-contracting are becoming increasingly popular, to the detriment of tens of thousands of workers in the UK.

Notwithstanding protestations to the contrary, judges have discretion within the existing legal paradigm to shift the impetus of current tests; and the power to purge them altogether, in line with the doctrine in other jurisdictions. The predicament of agency workers outside the UK, it should be clarified, is far from ideal, and has been subject to extensive criticism as well;

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<sup>168</sup> Id [6.4].

<sup>169</sup> A. Paz-Fuchs, ‘Privatisation, Outsourcing and Employment Relations in Israel’ in A. Paz-Fuchs, R. Mandelkern and I. Galnoor (eds) *Privatization in Israel* (Palgrave, 2018) 283; S. Rabin-Margaliot, ‘Service companies, service clients and especially those in between: on the status of workers of service providers and the enforcement of their rights’ (2009) 25 *Law Studies* 525.

and yet, it may be plausibly be seen as the result of social and economic forces that the courts are less competent to oppose. In the UK, in contrast, the courts' jurisprudence has needlessly exacerbated the state of affairs. This is not a foregone conclusion. Instead, courts may show awareness to the ramifications of existing doctrine, consistently maintain that the commercial contract and the employment contract are different beasts, and offer a renewed evaluation of the legitimacy of contractual structures that seek nothing but the evasion of employment status and rights. They may recognise that the formalist account, which supposedly adheres to set doctrine, doesn't actually do so. Instead, the decision to incorporate legal concepts from a commercial legal context to an employment one is a contested one, as is the particular interpretation given to particular terms (in this case, 'necessity' and 'sham'). These are, in other words, decisions of legal policy, which can and should pay more than lip-service to the real, social and economic consequences that derive from them.

Courts are aware that their decisions have an impact on individual's behaviour. In fact, as is the case when they 'send a message' with strict sanctions (e.g. for welfare beneficiaries) and penalties (for criminal offenders), for example, courts sometimes have an inflated view of the impact of their decisions, and explicitly base their reasoning on such a view. It thus seems peculiar to expect the legal community and the public at large to accept that in the social and economic realm, for example, courts have done all they can, and the ensuing problems rest with the legislature to address. After all, the legislature did not impose the concepts of sham or necessity, let alone their particular and peculiar interpretations, on the courts, and thus it is not (necessarily) for the legislature to solve. A few brief insights into the approaches of other common law jurisdictions reveal that British jurisprudence in this area is not only harsh, but also exceptional. There are commonalities, however. Indeed, as the paper shows, both in Britain and elsewhere we find that problematic tests for employment status in the agency work context leads (particularly) public authorities to distance themselves from workers, in a manner that affects not only the workers themselves, but also the quality and integrity of the service. These reasons suggest that the time has now passed for a realist revision of agency work jurisprudence.